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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 795

THE UNITED STATES OF AMERICA

v.

TWO-MASTED AUXILIARY SCHOONER RUTH MILDRED, etc.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 25–36) is reported in 47 F. (2d) 336. That of the Circuit Court of Appeals (R. 44–47) has not yet been reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered March 9, 1932. (R. 48.) Petition for certiorari was filed March 14, 1932, and certiorari was granted March 28, 1932. (R. 48.)

Jurisdiction to issue the writ rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a vessel, licensed by the United States to engage only in the fishing trade, which is seized by customs officers while illegally transporting a cargo of intoxicating liquor within United States territorial waters must be proceeded against by the Government under Section 26, Title II, of the National Prohibition Act, or by libel for forfeiture under Section 4377 of the Revised Statutes for engaging in an unlicensed trade.

STATUTES INVOLVED

These are printed in the Appendix, *infra*, pp. 18–20.

STATEMENT

The *Ruth Mildred* is an American two-masted auxiliary schooner which was licensed for fishing. (R. 21, 22.) On March 1, 1928, she was observed by the Coast Guard in Long Island Sound, making headway in the direction of New York. (R. 4, 5, 22.) A Coast Guard patrol boat followed her all night and until about eleven o'clock the next morning, when she docked in the East River, New York. (R. 5, 22.) At that point all the crew, including the master, hurriedly disappeared. (R. 5–6.) Later the master, who was also the vessel's owner, returned to the scene. (R. 5, 6, 22.)

The master admitted to the customs officers who were present to search the vessel that his ship contained liquor (R. 6, 22–23), and it was later determined upon search that the *Ruth Mildred* was carrying 390 bags containing alcohol, liquor, and rye whiskey (R. 10, 23). The vessel was seized (R. 23) and her master was arrested (R. 7).

The record discloses no criminal proceedings except that the master, Nils Soderberg, was charged in a complaint with having conspired with others unknown to violate the National Prohibition Act and the Tariff Act of 1922. (R. 23–25.)

In due course a libel of information was filed against the *Ruth Mildred* in the United States District Court for the Southern District of New York, wherein her forfeiture was claimed under Section 4377 of the Revised Statutes for violation of the provisions of her license. (R. 1–2.) Soderberg, the arrested master, intervened in the suit as owner-claimant. (R. 3.) In his answer (R. 3) he denied generally the offense which was charged and then pleaded that the Government's exclusive right of action lay in Section 26, Title II, of the National Prohibition Act.

After trial the District Court entered a decree dismissing the libel. (R. 25.) On appeal the judgment was affirmed, the Circuit Court of Appeals holding that the evidence established transportation under Section 26, Title II, of the National Pro-

hibition Act, and that the Government's exclusive right of forfeiture was under that Section. (R. 44–48.)

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in decreeing that the libel be dismissed and in holding that a licensed vessel of the United States seized in the unlawful trade of transporting intoxicating liquor in violation of her license could be forfeited only as provided in Section 26, Title II, of the National Prohibition Act. (R. 36–37.)

SUMMARY OF ARGUMENT

Where a vessel licensed to engage in the fishing trade is seized while engaging in a trade other than that for which she is licensed, she is subject to forfeiture under Section 4377 of the Revised Statutes, notwithstanding that at the time of the seizure she was engaged in the unlawful transportation of intoxicating liquor, and hence was subject to forfeiture under Section 26, Title II, of the National Prohibition Act.

The two statutes are not inconsistent, or in direct conflict, and the former is neither repealed nor superseded by the latter. Each defines a different offense, and each covers a different field.

Richbourg Motor Co. v. *United States*, 281 U. S. 528, does not cover the instant case. There the gist

of the offense was the unlawful transportation of intoxicating liquor, and the Government sought to invoke an old internal revenue statute, more rigorous than Section 26, to meet a situation it was not intended to meet. In the instant case, the Government relies upon a statute which was created for the express purpose for which it is here sought to be used. The fact that the seized vessel was engaged in the unlawful transportation of liquor at the time of the seizure was purely incidental. The nature of the cargo was quite immaterial.

While it is true that Section 4377, unlike Section 26, does not preserve the rights of innocent owners and lienors, such rights are preserved by administrative determination under other provisions of the navigation laws.

Moreover, assuming that Section 4377 and Section 26 are conflicting, Congress has manifested an intention that the navigation laws shall apply to vessels violating such laws, notwithstanding that such vessels are at the time engaged in illegally transporting intoxicating liquor.

Much of the argument of the Government in its brief in *General Motors Acceptance Corporation* v. *United States,* No. 574, present term, is applicable to this case, and we respectfully refer the Court to that argument.

ARGUMENT

I

THE FORFEITURE PROVISIONS OF SECTION 4377 OF THE REVISED STATUTES ARE NOT INCONSISTENT OR IN CONFLICT WITH AND WERE NOT IMPLIEDLY REPEALED BY SECTION 26, TITLE II, OF THE NATIONAL PROHIBITION ACT

It is not disputed that at the time of her seizure the seized vessel here involved was employed in another trade than that for which she was licensed. (R. 21, 22, 23.) Accordingly, the facts of this case bring it squarely within Section 4377 of the Revised Statutes (p. 18, *infra*) which declares that any such vessel shall be forfeited. But it is contended, and both courts below held, that since at the time of the seizure the vessel was engaged in the illegal transportation of intoxicating liquor, forfeiture of the vessel may be had only under Section 26, Title II, of the National Prohibition Act (pp. 18–20, *infra*), the effect of the latter statute being to supersede *pro tanto* Section 4377 of the Revised Statutes.

For their conclusions both courts below relied upon *Richbourg Motor Co.* v. *United States*, 281 U. S. 528. In that case this Court held that where a person discovered in the act of transporting liquor unlawfully has been arrested and the transporting vehicle seized under Section 26, proceedings to forfeit the vehicle must be taken under that Section, and may not be taken under Section 3450 of the Revised Statutes which provides for the forfeiture of vehicles used in the removal or concealment of

any commodity with intent to deprive the United States of a tax upon it.

Although since the National Prohibition Act became effective the forfeiture provisions of the navigation laws have been used extensively, where applicable, against vessels seized while unlawfully transporting or concealing intoxicating liquor, it is significant that their use in this manner was not generally challenged until the decision in the *Richbourg case*. In a number of cases decided prior to the *Richbourg* decision the issue of conflict between the forfeiture provisions of the navigation laws and Section 26 of the National Prohibition Act might have been, and in some cases was, raised.[1] *The Cherokee*, 292 Fed. 212 (S. D. Tex.); *The Amriald*, 6 F. (2d) 413 (D. R. I.); *The Mineola*, 16

[1] In some cases the seizures were effected outside the territorial limits of the United States. *The Rosalie M.*, 4 F. (2d) 815 (S. D. Texas), affirmed 12 F. (2d) 970 (C. C. A. 5th); *The Lorraine Rita*, 6 F. (2d) 175 (E. D. Penn.), 16 F. (2d) 607 (E. D. Penn.); *The Underwriter*, 6 F. (2d) 937 (D. Conn.), 18 F. (2d) 483 (C. C. A. 2d), affirmed *sub nom. Maul* v. *United States*, 274 U. S. 501; *Stephens et al.* v. *United States*, 30 F. (2d) 286 (C. C. A. 5th); *Le Bouef et al.* v. *United States*, 30 F. (2d) 394 (C. C. A. 5th); *Ford* v. *Kline*, 42 F. (2d) 558 (S. D. Fla.); *The K-5631*, 50 F. (2d) 180 (E. D. N. Y.).

In other cases the transportation had been completed prior to the seizure. *Bush* v. *The Conejo*, 10 F. (2d) 256 (D. Mass.), 16 F. (2d) 204 (C. C. A. 1st); *The Evelyn Ruth*, 42 F. (2d) 458 (D. Mass.), 47 F. (2d) 849 (C. C. A. 1st); *The Marge*, 48 F. (2d) 649 (D. Mass.), affirmed in *Jackman* v. *United States* (C. C. A. 1st), February 25, 1932.

F. (2d) 844 (C. C. A. 1st); *The Ruth*, 20 F. (2d) 314 (C. C. A. 3d); *The Rosemary*, 23 F. (2d) 103 (D. N. J.), reversed on point of jurisdiction, 26 F. (2d) 354 (C. C. A. 3d); *The K–3696*, 36 F. (2d) 430 (E. D. N. Y.); *Alksne* v. *United States*, 39 F. (2d) 62 (C. C. A. 1st), certiorari denied, 281 M. S. 768.

In the *Mineola* and *Alksne cases* the claimants actually raised the contention that the forfeiture provisions of the navigation laws had been superseded by Section 26, but this issue was decided against the claimants. In *The Spray*, 6 F. (2d) 414 (D. R. I.) it was held that a criminal prosecution under the National Prohibition Act made necessary the forfeiture of the vessel under that Act.

The foregoing cases indicate clearly that neither the courts nor the claimants of vessels considered that there was any substantial merit in the contention that there was a direct conflict between the forfeiture provisions of the navigation laws and Section 26 of the National Prohibition Act, except, perhaps, where a criminal prosecution had been instituted under the latter Act.

After the decision in the *Richbourg case* claimants of vessels libeled for forfeiture under the navigation law in liquor cases began to contend that that decision demonstrated that there was a conflict between the forfeiture provisions of the navigation laws and Section 26 of the National Prohibition

Act. In determining this issue the lower courts have differed widely in their conclusions, and their decisions can not be reconciled.

In *The Pilot,* 43 F. (2d) 491 (C. C. A. 4th), it was held that no conflict or inconsistency existed. That court said (p. 493):

> There is nothing in common between the National Prohibition Act and the navigation laws, and a vessel that engages in an unlawful trade contrary to the terms of her license need not necessarily be proceeded against under the National Prohibition Act because of the fact that the contraband cargo she carries is liquor.

In *The Daisy T,* 48 F. (2d) 370 (D. Del.), the court likewise held that the forfeiture provisions of the Prohibition Act and the navigation laws did not conflict, although its declaration appears to be dictum.

In *Corriveau* v. *United States,* 53 F. (2d) 735 (C. C. A. 1st), and *Maniscalco* v. *United States,* 53 F. (2d) 737 (C. C. A. 1st), the court held that the forfeiture provisions of the navigation laws could be applied even though the offending vessel was engaged in illegally transporting intoxicating liquor where no person was discovered and arrested in the act of transporting liquor, and in *United States* v. *American Motor Boat K–1231,* 54 F. (2d) 502 (C. C. A. 2d), the court reached the same conclusion. In the case last mentioned the court said (p. 505):

> Moreover, section 4377 of the Revised Statutes, which imposes a forfeiture where a vessel engages in a trade for which she is not licensed, and sections 593 (a) and (b) and 594 of the Tariff Act, which provide forfeiture for smuggling, cover a different field from that of the illegal transportation of liquor. They are a settled and vital part of our general navigation and customs laws, and do not conflict with section 26 of title II of the Prohibition Act aimed merely at forfeiture for illegal transportation of liquor. They are much farther from it than section 3450 of the Revised Statutes, which was involved in the Richbourg decision, where the use of the vessel [vehicle] was in the removal of taxable goods. Such removal was equivalent to transportation for which forfeiture is provided by section 26.

In addition to the case at bar, where the court below appears to have departed from the doctrine which it announced in the *American Motor Boat case,* there are other cases holding that a conflict does exist where both Section 26 of the National Prohibition Act and the forfeiture provisions of the navigation laws are applicable under the facts. *Colon* v. *Hanlon,* 50 F. (2d) 353 (C. C. A. 1st); *United States* v. *Wilfred Corriveau,* decided February 25, 1932 (C. C. A. 1st), now pending before this Court on petition for certiorari, No. 825, October Term, 1931.

The Government contends that the cases last above cited have misconstrued the *Richbourg* de-

cision in applying it to the navigation laws. The situation before this Court in the *Richbourg case* is not fairly comparable to the situation in the instant case. There a person operating an automobile belonging to another was arrested and arraigned before a United States Commissioner on a charge of illegal transportation of intoxicating liquor. The liquor and the car used for its transportation were seized by the officer making the arrest. The United States Attorney did not proceed with the prosecution of that charge, however, but procured an indictment under Section 3450 of the Revised Statutes for removing and concealing spirits with intent to defraud the Government of a tax. Thereafter proceedings to forfeit the seized vehicle were had under the same section of the internal revenue laws.

It seems clear that the substance of the offense involved in the *Richbourg case* was the unlawful transportation of intoxicating liquor. There was no evidence of removal or concealment of intoxicating liquor with intent to defraud the United States of tax thereon *except as such removal or concealment was necessarily involved in any unlawful transportation of intoxicating liquor*. The Government there invoked an old internal revenue statute, more rigorous than the one made applicable to liquor transportation cases by the National Prohibition Act, to meet a situation it was not originally intended to meet.

The instant case involves the seizure of a vessel by Coast Guard officers for engaging in a trade other than that for which the vessel was licensed. The duties of such officers were primarily to enforce the customs and navigation laws as opposed to the Prohibition Act. The seized vessel was licensed for the fishing trade. As such it could not lawfully transport any cargo except fish. The character of the cargo of the seized vessel was immaterial so long as it was anything else other than that which it was licensed to carry. It was wholly immaterial to the offense with which the vessel was charged that it carried intoxicating liquors. The vessel would have been equally subject to forfeiture if it had carried a cargo of silk or sugar.[1]

We submit that Section 4377 of the Revised Statutes should not be held in conflict with Section 26 of the National Prohibition Act because of the presence of a fact which is wholly irrelevant in the application of Section 4377. While the application of Section 26 of the National Prohibition Act to cases involving illegal transportation of liquor is, as pointed out in the *Richbourg case*, of wide extent, we believe that complete meaning can be given to that section without overturning equal-

[1] The same is true of pleasure yachts. The navigation laws make it unlawful for them to engage in the transportation of any sort of merchandise for pay. The character of the merchandise is wholly immaterial. *United States* v. *American Motor Boat K–1251*, 54 F. (2d) 502 (C. C. A. 2d), *supra*.

ly important statutes of long standing which occupy a distinct and separate field. There is nothing in the language or history of Section 26 to indicate that Congress intended to create a class of law violators who were to be affected by no other laws except the National Prohibition Act. Nor does there appear to be any reason for according to a vessel engaged in the transportation of liquor which has violated the customs and navigation laws any greater privileges than any other vessel violating the customs and navigation laws. Congress did not intend to grant immunity to all offenses under other Federal statutes in the course of the commission of which there is an unlawful transportation of liquor.

The Court of Appeals held that the two statutes here involved were in direct conflict. But, generally speaking, statutes can not be in direct conflict unless they are identical in the offenses they define. If they do not describe or define the same offense they are not necessarily in conflict because each may be applied to one transaction or to one set of circumstances. *United States* v. *One Ford Coupe*, 272 U. S. 321. The test of identity of offenses is whether the same evidence is necessary to establish each of them. *Carter* v. *McClaughry*, 183 U. S. 365; *Burton* v. *United States*, 202 U. S. 344; *Gavieres* v. *United States*, 220 U. S. 338; *Morgan* v. *Devine*, 237 U. S. 632.

Applying this test, it seems clear that Section 4377 of the Revised Statutes and Section 26, Title II, of the National Prohibition Act are entirely different. Forfeiture under Section 26 is one of the consequences of a successful criminal prosecution. It becomes effective at the time a person is convicted. Forfeiture under Section 4377 is strictly *in rem*. It is independent of any criminal prosecution and is effective as of the time of the commission of the offense. *United States* v. *Stowell*, 133 U. S. 1. Under Section 26 proof of liquor transportation is essential. Under Section 4377 the character of the merchandise carried is immaterial. Under Section 26 the documentation of the offending vessel is unnecessary. Under Section 4377 violation of license is essential. Thus the offenses charged under the two Acts are not the same in substance, nor are they established by the same evidence. It follows, we submit, that the statutes are not in direct conflict and accordingly that Section 4377 is not impliedly repealed by Section 26.

Both courts below were influenced by the asserted difference between the navigation laws and the National Prohibition Act in respect to the preservation and protection of the rights of innocent owners and lienors in vessels libeled for forfeiture. But the fact was that in the instant case no innocent claimant had appeared. The only person who intervened was the owner of the vessel who had been directly involved in the violation of its license.

Moreover, the rights of innocent owners and lienors are conserved under the navigation laws. For many years the Secretary of the Treasury had authority to protect such interests, where the navigation laws were involved, by Section 5294 of the Revised Statutes. (U. S. C., Title 18, Sec. 642.) When the Department of Commerce was created those duties and responsibilities were transferred to the head of that department. (Act of February 14, 1902, c. 552, 32 Stat. 825.) The law applying to the remission and mitigation of such statutory forfeitures for the benefit of innocent interests is in effect to-day.

While the administrative relief granted under the navigation laws may not be the exact equivalent of that which is provided by Section 26 of the National Prohibition Act, it would seem to be substantially the same since it must be assumed that the executive having full authority to provide relief will exercise his function in a proper manner.

Reference is made in the Government's brief in *General Motors Acceptance Corporation* v. *United States*, No. 574, to some of the practical difficulties which will arise if Section 26 of the National Prohibition Act is held to have superseded the forfeiture provisions of the customs and navigation laws in all liquor cases where the element of transportation is involved. Those comments apply with equal force here.

II

CONGRESS HAS MANIFESTED AN INTENTION THAT THE NAVIGATION LAWS SHALL APPLY TO VESSELS VIOLATING SUCH LAWS, NOTWITHSTANDING THAT SUCH VESSELS ARE AT THE TIME ENGAGED IN THE UNLAWFUL TRANSPORTATION OF INTOXICATING LIQUOR

The laws of the United States regulating ships and shipping had their origin during the early days of the nation. The particular statute under which the present libel was pleaded, Section 4377 of the Revised Statutes, originated as Section 32 of the Act of February 18, 1793, c. 8, 1 Stat. 305.

It seems clear that the navigation laws were intended primarily to aid in controlling the importation of merchandise into the United States. In *The Friendship,* Federal Cases, No. 5124, Mr. Justice Story, in speaking of the Act of 1793, said:

> * * * the great object of that act is to secure the revenue of the United States from frauds, and to prevent a foreign trade from being carried on under color of a coasting license.

More recently, in *Maul* v. *United States,* 274 U. S. 501, this Court pointed out that Sections 4377 and 4337 of the Revised Statutes were "directed to the protection of the revenue."

Congress recognized the close relationship between the navigation laws and the customs laws by providing in Section 35 of the Act of February 18, 1793, that the navigation laws should be enforced in the same manner as the customs laws. This pro-

vision, still in effect as Section 4380 of the Revised Statutes, reads:

> All penalties and forfeitures which shall be incurred by virtue of this Title may be sued for, prosecuted, and recovered as penalties and forfeitures incurred by virtue of the laws relating to the collection of duties, and shall be appropriated in like manner; except when otherwise expressly prescribed. (U. S. C., Title 46, Sec. 328.)

This being the relationship between the two groups of laws, we submit that the intent of Congress to preserve in effect the customs laws, undisturbed by liquor legislation, comprehends by necessary inference the navigation laws. For a discussion of that legislative intent we respectfully refer the Court to Point I of the Government's brief in *General Motors Acceptance Corporation* v. *United States,* No. 574, present term, where it is argued that Congress has manifested an intention that the forfeiture provisions of the customs laws should be applicable to vessels and vehicles seized by custom officers in the act of illegally *importing* intoxicating liquor into the United States, notwithstanding the fact that at the time of seizure such vehicles or vessels were engaged in the unlawful *transportation* of intoxicating liquor.

CONCLUSION

The decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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APRIL, 1932.

APPENDIX

STATUTES INVOLVED

Section 4377 of the Revised Statutes (U. S. C., Title 46, Sec. 325):

> Whenever any licensed vessel is transferred, in whole or in part, to any person who is not at the time of such transfer a citizen of and resident within the United States, or is employed in any other trade than that for which she is licensed, or is found with a forged or altered license, or one granted for any other vessel, such vessel with her tackle, apparel, and furniture, and the cargo, found on board her, shall be forfeited. But vessels which may be licensed for the mackerel-fishery shall not incur such forfeiture by engaging in catching cod or fish of any other description whatever.

Section 26, Title II, of the National Prohibition Act (Act of October 28, 1919, c. 85, Sec. 26, 41 Stat. 305, 315—U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an

officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale, shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. If, however, no one shall be found claiming the team, vehicle, water or air craft, or automobile, the taking of the same, with

a description thereof, shall be advertised in some newspaper published in the city or county where taken or if there be so newspaper published in such city or county, in a newspaper having circulation in the county, once a week for two weeks and by handbills posted in three public places near the place of seizure, and if no claimant shall appear within ten days after the last publication of the advertisement, the property shall be sold and the proceeds after deducting the expenses and costs shall be paid into the Treasury of the United States as miscellaneous receipts.

U. S. GOVERNMENT PRINTING OFFICE: 1931